(1)

91-288
No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BONG Y. KIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Did the Court of Appeals err in affirming the District Court's granting of a summary judgment motion on behalf of the United States, based upon the District Court's conclusion that the only issues in the case were purely questions of law which left no genuine issue of fact to be considered by the Court and that the United States was entitled to summary judgment as a matter of law?

B. Does the term "knowingly transports" used in Title 31 U.S.C., Section 5316 require that a person have actual knowledge of the reporting requirement when transporting monetary instruments into the United States in order to subject those monetary instruments to civil forfeiture to the United States?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bong Y. Kim, Defendant in the District Court and Appellant in the Court of Appeals respectfully petitions this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit for review and vacatur of the judgment entered by the Court of Appeals on March 18, 1991, (and the order entered April 11, 1991, in response to Petitioner's petition for rehearing) in the matter captioned UNITED STATES CURRENCY CONTAINED IN CERTIFICATE OF DEPOSIT #48050052-8, IN THE NAME OF BONG Y. KIM, AT FIRSTRUST SAVINGS BANK, 701

HAMILTON MALL, ALLENTOWN, PA 18101 and CERTIFICATE OF DEPOSIT #06-65-017164 IN THE NAME OF BONG Y. KIM AT HILL FINANCIAL SAVINGS ASSOCIATIONS, 400 MAIN STREET, RED HILL, PA and SAVINGS ACCOUNT #823581709, and CHECKING ACCOUNT #15134933, BOTH ACCOUNTS IN THE NAME OF BONG Y. KIM AT MERIDIAN BANK, 7TH and HAMILTON STREETS, ALLENTOWN, PA 18101, BONG Y. KIM, Appellant and docketed in the Court of Appeals at No. 90-1784, which affirmed the decision of the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 88-2040) and which permits the appellee United States of America to forfeit the said currency appearing in the caption of the case, which is the property of Petitioner Bong Y. Kim, on the basis of a summary judgment.

OPINIONS BELOW

The text of the opinion of the District Court is set forth as Appendix D to this petition. The opinion of the District Court has not been published. The Court of Appeals issued no written opinion, so there has been no publication.

GROUNDS FOR JURISDICTION

The judgment order of the Court of Appeals was filed on March 18, 1991, and the order denying Petitioner's petition for rehearing was filed on April 11, 1991. The text of the order of the Court of Appeals sur rehearing is set forth as Appendix B to this petition. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Honorable Court by 28 U.S.C. §1254(1).

STATUTES AND RULES

Title 18, U.S.C. §981(a)(1) and (2) states:

(A)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

(a) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal Bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(b) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.

(c) Any property, real or personal which constitutes or is derived from proceeds traceable to a violation of section 215, 656, 1005, 1006,

1007, 1014, 1032, or 1344 of this title or a violation of section 1341 or 1342 of such title affecting a financial institution.

(2) No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

Title 31 U.S.C. §5313(a) states:

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

Title 31 U.S.C. §5317(c) states:

(c) If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government. A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier,

messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the addressee or intended recipient without being transported further in, or taken out of, the United States.

Title 31 U.S.C. §5316(a) states:

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports or has transported monetary instruments of more than $5,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States, or

(2) receives monetary instruments of more than $5,000 at one time transported into the United States from a place outside the United States.

Title 31 U.S.C. §5324 states:

No person shall for the purpose of evading the reporting requirements of §5313(a) with respect to such transaction—

(1) cause or attempt to cause a financial institution to fail to file a report required under §5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under §5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist into structuring, any transaction with one or more domestic financial institutions.

STATEMENT OF THE CASE

In December, 1987, Bong Y. Kim enlisted the aid of Lieutenant Colonel Gary Flack (U.S. Army, Retired), a former military friend, in getting $350,000.00 of his deceased father's estate out of the Republic of Korea. Although Kim's father was a preeminent jurist in Korea, Korean laws (which have since been repealed) forbade removal of such funds from the country. Kim anticipated Flack would accomplish this deed due to their prior relationship and would comply with any U.S. Customs Service requirements.

However, upon his return to the United States on December 31, 1987, Flack failed to file the postcard-size declaration form for $349,700.00 he was transporting and then demanded 5% as a service fee.

The United States sought civil forfeiture of the estate proceeds under 18 U.S.C. §981(a)(1)(C), pursuant to the Complaint for Forfeiture which was stayed, pending disposition of the criminal charges, on October 31, 1988.

On November 18, 1988, 18 U.S.C. §981(a)(1)(C) was repealed.

On December 6, 1988, pursuant to a plea agreement, Kim entered a guilty plea to the following counts in the criminal indictment:

COUNT 1

Conspiracy to transport approximately $349,000 in United States currency into the United States without filing the proper Customs reporting forms, in violation of 31 U.S.C. §5316.

COUNT 2

Structuring on January 6, 1988, the deposit of $9,000 in United States currency into a bank account to evade the requirement of filing a Currency Transaction Report, in violation of 31 U.S.C. §5324(3).

COUNT 40

Structuring on January 19, 1988, the deposit of $8,500 in United States currency into a bank account to evade the requirement of filing a Currency Transaction Report, in violation of 31 U.S.C. §5324(3).

On March 13, 1989, the remaining 37 counts were dismissed, and the Honorable Judge Edmund V. Ludwig sentenced Kim to probation.

Thereafter, the government amended its Complaint for Forfeiture to include forfeiture under 31 U.S.C. §5317(c), because 18 U.S.C. §981(a)(1)(C) had been repealed, and, even if it were still in force, it would have only been applicable to the currency involved in Count 2 and Count 40 of the indictment.

Thus, when Kim changed his plea from not guilty to guilty and was sentenced by Judge Ludwig, only $17,500.00 was subject to forfeiture.

As Kim clearly indicated in his sworn testimony on December 6, 1988, he was unaware of Flack's failure to file required Customs' forms until after the courier was back in Los Angeles, and Kim's actions after that date were only designed to preclude Korea from discovering the money had been spirited out of that country and to prevent official reprisals or retribution against Kim's relatives remaining there.

On October 11, 1990, the District Court entered an order granting the government's motion for a summary judgment, which was appealed to the Court of Appeals on October 22, 1990.

On March 18, 1991, the Court of Appeals affirmed the District Court's decision, and on April 11, 1991, after a petition for rehearing was filed with the Court, an order was entered denying the rehearing petition.

ARGUMENT

The decision below should be reviewed because it involves serious issues regarding the denial of a litigant of his day in court in order to prevent the United States from confiscating his personal property. The decision of the Court of Appeals conflicts with and departs from other decisions rendered by other Courts of Appeal on a question of law that has not been the subject of a written opinion of this Honorable Court.

A. The District Court erred in granting a Summary Judgment based on evidence of record and in finding that there was no genuine issue of material fact.

Ruling on a motion for Summary Judgment, the court must consider the evidence in a light most favorable to the non-moving party, *United States v. Dieblo, Inc.,* 369 U.S. 654, 655 (1962); *Baker v. Lukens Steel Co.,* 793 F.2d 509, 511 (3d Cir. 1986), must give that party benefit of all reasonable inferences arising from the evidence, *Tigg Corp. v. Dow Corning Corp.,* 822 F.2d 358, 361 (3d Cir. 1987); *Gans v. Mundy,* 762 F.2d 338, 341 (3d Cir. 1985) *cert. denied,* 474 U.S. 1010 (1985), and must take as true all allegations of the non-moving party that conflict with those of the movant, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Williams v. Borough of Chester,* 891 F.2d. 458, 460 (3d Cir. 1989).

In *Friction Division Product v. E.I. Dupont de Nemours,* 658 F. Supp. 1007 (D. Del. 1987), a standard for summary judgment was defined, so that "the District Court should only decide the case as a matter of law where facts are undisputed or evidence is so one-sided that it leaves no room for any reasonable difference of opinion as to any material fact," *Tunis Bros. Co., Inc. v.*

Ford Motor Co., 763 F.2d. 1482, 1489 (3d Cir. 1985). Also, the moving party must "positively and clearly demonstrate that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against him." *United States v. $4,255,625.39,* 528 F. Supp. 969 (1981), *National Screen Service Corp. v. Pastei Exchange, Inc.,* 305 F.2d 647, 651 (5th Cir. 1962).

The government, in moving for Summary Judgment, and the District Court below, in deciding to grant the motion, relied upon various documentary exhibits, submitted in conjunction with the Motion for Summary Judgment and subsequent Reply Memorandum of Law in support thereof, to establish the initial burden of the government, as the moving party, to demonstrate the absence of any genuine issue of material fact.

It is difficult to determine from the lower court's Memorandum exactly which of those documents was specifically relied upon.

In Footnote 3, the Honorable Judge Lowell Reed indicated he had not decided the authenticity of Kim's Diary (Exhibit B to Motion for Summary Judgment), but the genuineness of the document is irrelevant, because "it is not dispositive of the case and the result would be the same even if the diary did not exist."

However, the court also seemingly relied upon Kim's Diary in Footnote 8, which states:

> "However, . . . even if the guilty plea was entirely admissible, the other documents submitted by the government, such as Special Agent Campbell's affidavit and memorandum of interview, and Kim's Diary are sufficient to meet the government's burden and shift the burden of proof to the claimant."

The same type of bifurcated treatment of assigning reliability is also applied to the content of the Claimant's plea colloquy at the criminal proceeding in the District Court.

In his Factual Background, Judge Reed affirmatively found Kim "further stated that he was unaware of the reporting requirements and he assumed that Flack would have transported the currencies in a lawful manner," (p. 3 of Memorandum quoting p. 36 of Exhibit D to government's Motion for Summary Judgment).

Yet, the court, in addition to comments in Footnote 8, also found "perhaps most compelling the . . . plea colloquy in which Kim pleaded guilty to conspiring to violate 31 U.S.C. Section 5316 and to two counts of money laundering in violation of Section 5324 with respect to the currency in question," (p. 7 of Memorandum), in determining the government had clearly met its burden as to the *res* necessary to shift the burden of proof to the petitioner to demonstrate "by a preponderance of evidence that the United States currency in question was not in fact subject to forfeiture."

Therefore, the court apparently based its initial decision on the non-existence of any genuine issue of material fact upon a diary that was non-dispositive of the case and a plea colloquy which was both "most compelling" and irrelevant, if it was not entirely inadmissible.

Other documents submitted by the government were likewise flawed, although in a more obvious manner, as the Court observed when it noted that the Memorandum of Interview with Bong Kim (Exhibit A) and the Affidavit of Special Agent Wayne Campbell were unsigned when originally submitted to the District Court (Footnote 3, Memorandum). However, this blatant defect was "cured" by the attachment of properly signed copies of the respective documents to the government's Reply Memorandum of Law.

This curative process completely disregards the question of when those documents were signed, as they were allegedly created and authenticated in 1988 or more than two years afterward as the government was seeking to "cure" its sick evidence.

Therefore, the quality and quantity of evidence utilized by the government to sustain its initial burden is

highly suspect or equivocal at best, as demonstrated amply by the District Court in utilizing some of it for one argument, while discarding it for another argument, and vice versa.

Furthermore and in particular, Petitioner claims there is clearly an issue of material fact which precludes Summary Judgment, to wit, whether the alleged violations were committed without Petitioner's knowledge. This is, the Court will note, a statutory defense made available in 18 U.S.C. §981 (a)(2), which provides:

> 2) No property shall be forfeited under this section to the extent of the interest of owner or lienholder by reasons of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

The court clearly erred by ignoring said defense and by inferring that it doesn't matter who committed the offense (or knew about said commission) because the proceedings were technically *in rem*.

Judge Reed stated (at p. 6 of his Memorandum) that "[i]n an *in rem* action the government does not need to show that any particular individual transported the currency into the United States, it is sufficient to show the currency to be forfeited is traceable to the statutory violation."

That analysis fails because it permits the government to disregard the applicable and available statutory defense in §981 (a)(2) in meeting its initial burden of demonstrating the absence of any genuine issue of material fact.

Petitioner's firmness in his plea colloquy and throughout these proceedings that he was unaware Flack was not going to file the 4790 form upon arrival in Los Angeles, proves there is an "act or omission established by that owner . . . to have been committed without the knowledge of that owner . . .", established by Kim, and that has invoked application of the provisions of

§981 (a)(2) and effectively precludes the United States from proceeding with the forfeiture unless and until it can be definitively proved that the defense of §981 (a)(2) is not available to the owner of the subject currency. Required definite proof does not exist in this case.

Consequently, the government failed to meet its burden of demonstrating total absence of genuine issues of material fact which "is initially on the moving party regardless of which party would have the burden of persuasion at trial." *First National Bank of Pennsylvania v. Lincoln National Life Insurance Company,* 824 F.2d 277, 280 (3d Cir. 1987). It was error to grant Summary Judgment under those circumstances.

B. "Knowingly Transports" in 31 U.S.C. §5316 requires actual knowledge of the reporting requirement, and forfeiture under 18 U.S.C. §981 (a)(1)(c) requires actual knowledge of the statute.

In this case there exists a significant issue about Petitioner's "knowing transport" of the currency in violation of 31 U.S.C.§5316 and "knowledge" of the statute under 18 U.S.C.§981 (a)(1)(c) and 31 U.S.C. §5317 (c).

> "Before currency can be subject to a civil forfeiture proceeding pursuant to the Currency and Foreign Transactions Reporting Act, based on failure to declare it before attempting to transport it into or out of the country, party must have actual knowledge of reporting requirement." *United States v. $359,500 in United States Currency,* 645 F. Supp. 638, (N.D.N.Y. 1986).

Petitioner is not a United States native, but a resident alien and emigre from Korea. His main focus was on the legal difficulties of getting the money out of Korea, rather than unknown legal problems involved in getting it into the United States. He enlisted Flack to transport the money out of Korea and into the United States without any knowledge of the statute or reporting requirements of United States Customs Service.

The court below claims that forfeiture under 31 U.S.C.§5317 (c) does not require actual knowledge of that reporting requirement. There is case law to support that view, *[United States v. $359,500 in United States Currency,* 828 F.2d 930 (2d. Cir. 1987); *United States v. $47,980 in Canadian Currency,* 804 F.2d. 1085 (9th. Cir. 1986); and *United States v. $20,757.83 in Canadian Currency,* 769 F.2d. 479 (8th. Cir. 1985)], but there is also a substantial body of case law which holds an opposite position, that a "knowing transporter" subject to 31 U.S.C. §5317 (c) civil forfeiture is one who willfully violates the reporting requirement and is subject to criminal prosecution under 31 U.S.C. §5322. *United States v. $24,900,* 770 F.2d. 1530, 1533 (11th. Cir. 1985); Cf. *United States v. $48,595,* 705 F.2d. 909, 914 (7th Cir. 1989). This case law requiring knowledge obviously agrees and comports with the "unknowing owner" defense found in 18 U.S.C. §981 (a)(2).

A third circuit court has held the terms "knowingly" and "willfully" require proof of knowledge of the reporting requirement and specific intent to commit the crime, and Congress by adding these terms, took this statute out of the ranks of strict liability crimes:

> ". . . because the failure to report, when one is without knowledge of the reporting requirement, must be classified as a "nonfeasance" as opposed to a "misfeasance"." *United States v. Grande,* 565 F.2d. 926, (5th Cir. 1978).

As in most civil cases, a penalty or forfeiture may be sustained by the preponderance of the evidence, but here the government failed to show the Petitioner either willingly or knowingly failed to file the necessary forms. It was Flack alone who transported the money and failed to file the forms.

In *United States v. One (1) lot of $24,900 in United States Currency, supra,* the court held:

> "actual knowledge of the currency requirement by the person from whom the monetary instrument was seized is a necessary element of a civil forfeiture action under 31 U.S.C. §5317 (b), [now §5317 (c)]" at 1533. Alternatively, the court in *United States v. $359,500 in United States currency,* 645 F.Supp. 638, 643 (W.D.N.Y. 1986), ruled that even if "actual knowledge is not required for a civil forfeiture, some notice, or opportunity to learn, must be provided."

Unless the government proves actual knowledge of the statute, and implementing regulations, on Petitioner's part, the United States has not resolved the factual and legal issues involved.

In view of the legislative history and the provisions of 18 U.S.C. §981 (a)(2), it makes little sense to interpret "knowingly" as not applying to the reporting requirement. The purpose of the Act — obtaining reports — can only be achieved if travelers are aware of the reporting requirements. If one is unaware of the reporting requirement, one cannot be expected to comply, notwithstanding the possibility of a subsequent forfeiture or any other sanction. *United States v. $359,500, supra,* at 641.

The government has clearly not met its burden to demonstrate the property is subject to forfeiture under both 18 U.S.C. §981 and 31 U.S.C. §5317.

The purpose of the reporting requirement on currency exports and imports is not intended to limit or impede the free flow of currency in international commerce.

> "Failure to require knowledge of the reporting requirements could well impede the mobility of international capital into and out of the United States. A signal would be sent that the United States law may well be filled with booby-traps that spring

without warning to grab the currency of unsuspecting travelers." *United States v. $24,900, supra,* at 1535.

The currency in this case was not an ill-gotten gain from an illegal activity, but the legacy from a father's estate. "Possessing and transporting currency is in and of itself legal. There is no inherent notice, as in the case of narcotics or firearms, that there may be limitations on its transportation across a border." *United States v. $359,500, supra,* at 643.

Based upon foregoing, it was clearly erroneous for court to allow confiscation of the Petitioner's currency.

CONCLUSION

The foregoing facts and law clearly establish several genuine issues of material fact which require the necessity of a jury trial. The government's evidence was deficient and incomplete, raising sufficient doubt as to the absence of genuine issues to deny summary judgment. Substantial case law requires actual knowledge of the reporting requirement and therefore cannot sustain forfeiture in this case. The confiscation of the currency was erroneous and the summary judgment improper and wrongfully granted.

Petitioner has established the currency was not "dirty" or from an illegitimate source. On the contrary, it is the financial residue of his late jurist-father's real estate holdings in Korea. It is indeed ironic and, moreover, tragic, that the accumulation of the honest labor of two lifetimes is being confiscated by American statutes created in 1986 as part of the Anti-Drug Abuse Act to deprive international drug barons of their ill-gotten gains.

He has also established that this case is replete with unresolved issues of facts and law.

Those issues and potential defenses have not and cannot be resolved on their merits in the inadequate forum of a summary judgment. Like three of the four

defendants in *State Farm v. Rosenfield,* 683 F. Supp. 106 (E.D. Pa. 1988), all of whom had previously offered a plea of guilty to several counts, Kim deserves his day in court on the issues, because, here, as in *Rosenfield,* the issues of disputed fact in the record and the changing posture of the recent law and regulations in this matter demand the necessity of a jury determination.

WHEREFORE, Petitioner respectfully requests this Honorable Court grant his petition and set aside and vacate the Judgment Order of the Court of Appeals for the Third Circuit entered March 18, 1991, and remand the case for further proceedings.

Karoly Law Offices

By ____________________

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Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1784

UNITED STATES OF AMERICA

UNITED STATES CURRENCY CONTAINED IN CERTIFICATE OF DEPOSIT 48050052-8, IN THE NAME OF BONG Y. KIM, AT FIRSTRUST SAVINGS BANK, 701 HAMILTON MALL, ALLENTOWN, PA 18101 and CERTIFICATE OF DEPOSIT 06-65-017164 IN THE NAME OF BONG Y. KIM AT HILL FINANCIAL SAVINGS ASSOCIATIONS, 400 MAIN STREET, RED HILL, PA and SAVINGS ACCOUNT #823581709, AND CHECKING ACCOUNT #15134933, BOTH ACCOUNTS IN THE NAME OF BONG Y. KIM AT MERIDIAN BANK, 7TH AND HAMILTON STS., ALLENTOWN, PA. 18101

BONG Y. KIM,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 88-02040)
District Judge: Honorable Lowell A. Reed, Jr.

Submitted Under Third Circuit Rule 12(6)
March 11, 1991
Before: MANSMANN, HUTCHINSON and WEIS,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

Attest:

Sally Mrvos

Sally Mrvos, Clerk

March 18, 1991

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1784

UNITED STATES OF AMERICA
vs.
U.S. CURRENCY, ETC.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,*
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO
and WEIS, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

April 11, 1991

* Senior Circuit Judge Weis voted only as to panel rehearing.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
UNITED STATES CURRENCY,	:	
CONTAINED IN CERTIFICATE	:	
OF DEPOSIT; 48050052-8, IN	:	
THE NAME OF BONG Y. KIM,	:	
AT FIRSTRUST SAVINGS BANK,	:	
701 HAMILTON MALL,	:	
ALLENTOWN, PA 18101, et al.,	:	
Defendants.	:	NO. 88-2040

ORDER

AND NOW, this 9th day of October, 1990, upon consideration of plaintiff United States' motion for summary judgment, affidavits, and documents of record, and for the reasons set forth in the attached memorandum, it is hereby ORDERED that summary judgment is entered in favor of plaintiff United States and against defendant United States Currency, et al., and defendant Currency is hereby forfeited to the United States pursuant to 31 U.S.C. §5317(c) and 18 U.S.C. §981(a)(1)(C).

LOWELL A. REED, JR., J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
UNITED STATES CURRENCY, CONTAINED IN CERTIFICATE OF DEPOSIT; 48050052-8, IN THE NAME OF BONG Y. KIM, AT FIRSTRUST SAVINGS BANK, 701 HAMILTON MALL, ALLENTOWN, PA 18101, et al.,	:	
Defendants.	:	NO. 88-2040

MEMORANDUM

Reed, J. October 9, 1990

Plaintiff, United States brought this *in rem* action seeking forfeiture of defendant, United States Currency[1] pursuant to 31 U.S.C. §5317(c)(Supp. 1990) and 18 U.S.C. 981(a)(1)(C)(Supp. 1990)[2] for its transportation into the United States without filing the proper forms in violation of 31 U.S.C. §5316 (Supp. 1990) and structuring transactions with said currency to avoid filing currency transaction reports (CTRs) in violation of 31 U.S.C. §5324 (Supp. 1990).

---

1. Defendant United States Currency is contained in certificate of deposit #48050052-8 at Firstrust Savings Bank, certificate of deposit #06-65-017164 at Hill Financial Savings Association, and savings account #8235831709 and checking account #15134933 both at Meridian Bank.

2. Congress repealed 18 U.S.C. 981(a)(1)(C) in November 1988. It has substantively been replaced by the amended 18 U.S.C. 981(a)(1)(A). However, because the government brought a proper action prior to the repeal, 981(a)(1)(C) is still applicable to this action. See 1 U.S.C. 109 (Supp. 1990).

Before me is the motion of plaintiff United States for summary judgment. For the reasons set forth below, the motion of plaintiff shall be granted.

FACTUAL BACKGROUND

The relevant facts of this case are not in dispute. About September 1987, Bong Y. Kim discussed transporting approximately $350,000.00 into the United States with Gary L. Flack, a retired U.S. Army Lieutenant Colonel. After several discussions Kim and Flack arranged the details whereby Flack would fly to Korea at Kim's expense, contact Kim's cousin and return with the money. Flack carried out the arrangement and upon his return to the United States met Kim at the airport to transfer the money. Flack informed Kim that when he went through U.S. Customs he had hidden some currency in his boots and most of it in his luggage. Flack, who had not filed a custom's report for the transfer of currency over $10,000.00, also demanded five percent of the currency for his services. *See* Memorandum of Interview, Exhibit A to plaintiff's motion for summary judgment at 4-6 (interview between Bong Y. Kim and Internal Revenue Service Special Agent Wayne E. Campbell) [hereinafter Memorandum of Interview].

Kim first attempted to convert the $349,700 in currency into a cashier's check. However, when he was informed that a CTR would have to be filed he left the bank without converting the money. Kim then learned that he could inconspicuously deposit under $10,000.00 into several bank accounts and thereby avoid filing any CTRs or attracting any attention. *See* Memorandum of Interview at 7. Subsequently, Kim made 36 deposits of $8,500 to $9,600 in United States currency at eleven banks between January 6, 1988 and January 19, 1988. *See* Affidavit of Wayne Campbell, Exhibit C to plaintiff's motion for summary judgment at 3-5, 8-10, 13, and 16 Kim then consolidated these accounts into four separate

accounts by January 21, 1988. *Id*, at 16-17; *see also* Kim's Diary, Exhibit B to plaintiff's motion for summary judgment.

Based on the foregoing information, Internal Revenue Service Special Agent Wayne Campbell obtained a warrant and defendant United States currency was seized. *See* Warrant for Arrest in Action *In Rem* (Document No. 3). Kim and Flack were charged with conspiring to transport approximately $349,000 in United States currency into the United States without filing the customs reporting forms, in violation of 31 U.S.C. § 5316. *See* Plaintiff's Memorandum of Law at 6. Kim was further charged with 39 counts of money laundering by structuring his transactions to avoid filing CTRs, in violation of 31 U.S.C. § 5324. *See* Transcript of Plea Hearing, Exhibit D to plaintiff's motion for summary judgment, Kim pled guilty to the following three counts of the indictment: Count 1, conspiring to transport more than $10,000 in United States currency into the United States without filing the required forms, and Counts 2 and 40, knowingly and willfully structuring and attempting to structure a transaction to avoid the reporting requirements.

At the plea hearing on his guilty plea, Kim stated that his money was lawfully obtained through the sale of property he inherited from his father in Korea. Transcript of Plea Hearing, Exhibit D to plaintiff's motion for summary judgment at 25-27. He further stated that he was unaware of the reporting requirements and he assumed that Flack would have transported the currency in a lawful manner. *Id*, at 36. Finally, Kim stated that his purpose in attempting to avoid all reporting requirements was to prevent the Korean government from becoming aware of the transfer because of a Korean law, which has since been repealed, that prohibited the exportation of currency. He was concerned that his family who had remained in Korea not be penalized or have their employment positions jeopardized by his actions in violating Korean law. *Id*, at 37-40.

Based upon these facts, Plaintiff United States now moves for summary judgment. In response Kim argues that there remains several genuine issues of material fact in this case precluding summary judgment. Kim contends that pursuant to promises made outside the written plea agreement between himself and the United States, plaintiff is unable to pursue this forfeiture action. Alternatively, he argues that even if the government is entitled to the forfeiture it should be limited to $17,500.00, the total amount involved in counts 2 and 40 to which he pled guilty. Finally, Kim argues that the United States is required but unable to show he had actual knowledge of the reporting requirements of 31 U.S.C. § 5316.[3]

DISCUSSION

Under the Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340-41 (3d Cir. 1990). For a dispute to be "genuine", the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Williams v. Borough of Chester*, 891 F.2d 458,

3. Claimant also stated that the Memorandum of Interview, Exhibit A to plaintiff's motion for summary Judgment and Affidavit of Wayne Campbell and Seizure Warrant, Exhibit C to plaintiff's motion for summary judgment are not admissible because they are unsigned. The United States has cured this defect by attaching signed copies of each in its reply memorandum of law. In addition, claimant claims that Kim's Diary, Exhibit B to plaintiff's motion for summary judgment, is not "viable evidence" – because it is not signed by Kim or completed entirely in his handwriting. I will not rule on the authenticity of the entire diary except to state that it is not dispositive of the case and the result would be the same even if the diary did not exist.

460 (3d Cir. 1989). To establish genuine issue of material act, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett,* 477 U.S. 317, 322 (1986). The burden of demonstrating the absence of genuine issues of material fact is initially on the moving party regardless of which party would have the burden of persuasion at trial. *First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins. Co.,* 824 F.2d 277, 280 (3d Cir. 1987). Following such a showing, the non-moving party must present evidence through affidavits or depositions and admissions on file, which comprise of a showing sufficient to establish the existence of every element essential to that party's case.[4] *Celotex*, 477 U.S. at 323. If that evidence is, however, "merely colorable" or is 'not significantly probative,' summary judgment may be granted." *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987) (quoting, in part, *Anderson*, 447 U.S. at 249-50).

The United States is seeking civil forfeiture pursuant to 18 U.S.C. § 951(a)(1)(C)[5] and 31 U.S.C.

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4. In ruling on a motion for summary judgment, the court must consider the evidence presented in a light most favorable to the non-moving party, *United States v. Diebolo, Inc.*, 369 U.S. 654, 6SS 1962); *Baker v. Lukens Steel Co.,* 793 F.2d 509, 511 (3d Cir. 1986), must give that party the benefit of all reasonable inferences arising from that evidence, *Tigg v. Dow Corning Corp.,* 822 F.2d 358, 361 (3d Cir. 1987); *Gans v. Mundy,* 762 F.2d 338, 341 (3d Cir.), *cert. denied,* 474 U.S. 1010 (1985), and must take as true all allegations of the non-moving party that conflict with those of the movant. *Anderson,* 477 U.S. at 255.

5. Prior to the 19th amendment, 981(a)(1)(C) provided that, any coin and currency, or other monetary instrument as the Secretary of the Treasury may prescribe, or any interest in other property, including any deposit in a financial institution, traceable to such coin or currency involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31 be seized or forfeited if the violation is by a domestic

§ 5317(c)[6]. In a civil forfeiture action the government has the initial burden of establishing probable cause for forfeiture. Probable cause may be established by showing a reasonable basis to believe there is a substantial connection between "the property to be forfeited and the criminal activity defined by the statute." *United States v. Premises Known as 2639 Meetinghouse,* 633 F.Supp. 979, 986 (E.D. Pa. 1986). In an *in rem* action the government does not need to show that any particular individual transported the currency into the United States, it is sufficient to show that the currency to be forfeited is traceable to the statutory violation, which in this case is a violation of 31 U.S.C. § 5316 and 31 U.S.C. § 5324. The burden then shifts to the claimant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture. *Id.* at 987.

The government has clearly met its burden demonstrating probable cause to believe the property is subject to forfeiture under both 18 U.S.C. § 981 and U.S.C. § 5317. The United States has submitted "evidence of Kim's admissions, Kim's and Flack's criminal adjudications and the information from the banks" in support of its position. Plaintiff's Memorandum of Law at 10. The affidavit of Special Agent Wayne Campbell, contained in the seizure warrant, detailed the chronology of Kim's attempts to structure his currency transactions in order to avoid filing currency transaction report. The basis of

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NOTES *(Continued)*

financial institution examined by a federal bank supervisory agency or financial institution regulated by the Securities and Exchange Commission or a partner, director, officer, or employee thereof.

18 U.S.C. § 981(a)(1)(C)(Supp. 1990).

6. 31 U./S.C. § 5317(c) provides in pertinent part,

If a report required under section 5316 with respect to any monetary instrument is not filed . . . the instrument and any interest in property, including a deposit in a financial institution traceable to such instrument may be seized and forfeited to the United States Government.

31 U.S.C. § 5317(c)(Supp. 1990).

his affidavit included interviews with various bank employees who provided him with information regarding Kim's transaction records including dates, amounts and account numbers. *See* Affidavit of Wayne Campbell, Exhibit C to plaintiff's motion for summary judgment. The government presented Kim's dairy which contained Kim's own recordings of his transactions. *See* Dairy, Exhibit B to plaintiff's motion for summary judgment. Furthermore, and perhaps compelling, the government submitted Kim's plea colloquy in which Kim pleaded guilty to conspiring to violate 31 U.S.C. § 5316 and to two counts of money laundering in violation of § 5324 with respect to the currency in question. *See* Transcript of Plea Hearing, Exhibit D to plaintiff's motion for summary judgment at 32. Based on this evidence the government has met its burden as to the *res*.

The government, having established that the currency in question was traceable to the violations of § 5316 and § 5324, shifted the burden of proof to the claimant to show by a preponderance of the evidence that the United States currency in question was not in fact subject to forfeiture. Kim, however, is unable to meet this burden or present any inference from which a genuine issue of material fact may be drawn.

Kim makes three arguments limiting the use of the guilty plea. First, Kim states that the government is not entitled to bring a forfeiture action at all because, pursuant to promises made outside the written plea agreement between himself and the United States, it promised not to do so. Kim relies on *Santobello v. New York*, 404 U.S. 257 (1971). Kim asserts that since the government breached this alleged oral promise he is entitled to withdraw his guilty plea or receive specific performance of the alleged promise. Kim cites *United States v. United States Currency the Amount of $228,536*, 895 F.2d 908 (2d Cir. 1990). Second, Kim argued that since he only pled guilty to two counts of money laundering, only that amount subject to those counts, a total of $17,500.00, should be put in jeopardy

of forfeiture. Third, Kim argues that the plea should not be used for the government's claim under 31 U.S.C. § 5317(c) because that claim was not part of their civil forfeiture action at the time his plea was given and he was therefore unaware that he was placing the entire amount in jeopardy of forfeiture.[7]

These arguments fail in light of Kim's plea agreement and colloquy. Kim, while under the advice of counsel, was specifically questioned and denied that any promises were made to him outside of the ones set forth in the plea agreement and that any promises made would be in writing signed by the parties. *See* Guilty Plea Transcript at 16; see also Plea Agreement, Exhibit F to plaintiff's reply memorandum to motion for summary judgment. Furthermore, Kim stated that he knew what was involved in the guilty plea and that it was the best decision under the circumstances. It is clear that Kim knowingly and voluntarily agreed to the terms of his plea agreement. Kim is, therefore, estopped from now asserting otherwise as a basis for excluding the government's use of the plea in support of its motion, withdrawing his plea or precluding the government from bringing a forfeiture action. *See Stassi v. United States*, 439 F.Supp. 277 (D.N.J. 1976), *aff'm*, 559 F.2d 1210 (3d Cir. 1977). Consequently, the guilty plea will properly serve as an admission to establish that defendant currency was traceable to violations of § 981 and § 5316.

With respect to Kim's second and third arguments regarding the guilty plea there is no requirement that a defendant be informed of the collateral consequences of pleading guilty and the government is therefore entitled to seek civil forfeiture of the entire amount. *See United States v. Romero-Vilca,* 850 F.2d 177, 179 (3d Cir. 1988) (Rule 11 does not require explanation of collateral

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7. Government amended its complaint December 18, 1989 (Document No. 15) after claimants' guilty plea hearing.

consequences, that is, "consequences not related to the length or nature of the sentence imposed on the basis of the plea.")[8]

Kim next argued that the term "knowingly transports" in 31 U.S.C. § 5316 requires actual knowledge of the reporting requirement in order to be held liable for forfeiture under 31 U.S.C. § 5317(c). There is no uniformity among the circuits as to this point, however, the majority of courts, including those in the Third Circuit, have held that actual knowledge is not required for civil forfeiture. *See United States v. $359,000 in United States Currency*, 828 F.2d 930, 932-33 (2d Cir. 1987) (see cases cited therein).[9]

In *United States of America v. $20,900.00 in United*

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8. Kim contends that the guilty plea limits the amount which can be confiscated to just $17,500.00 on the government's 981 claim because that is all that he pled guilty to money laundering. However, it is not necessary to make that determination at this time because even if the guilty plea was entirely inadmissible, the other documents submitted by the government, such as Special Agent Campbell's affidavit and memorandum of interview, and Kim's diary are sufficient to meet the government's burden and shift the burden of proof to the claimant. In addition, defendant United States currency is already subject to forfeiture under 31 U.S.C. § 5317(c) pursuant to this memorandum and the attached order.

9. In *United States v. $359,000 in United States Currency*, the court followed the majority vote holding that actual knowledge of the reporting requirement of 31 U.S.C. § 5316 is not required. It distinguished between one who "willfully" violates the reporting requirements and is subject to criminal penalties and one who "knowingly" violates the reporting requirements and is subject to civil penalties, the former requiring actual knowledge and specific intent to violate it. In reaching its conclusion, however, the court stated that due process requires constructive knowledge but the court did not decide whether the enactment of § 5316 alone would provide sufficient notice. *Id.* at 935.

The minority view, which the claimant argues, "equates a person who 'knowingly' transports money and is subject to the civil forfeiture penalty 31 U.S.C. § 5317(c) with one who 'willfully' violates the reporting requirements and is subject to criminal prosecution under § 5222." *United States v. $359,000 in United States Currency*, 828 F.2d at 933 (see cases cited herein).

States Currency, No. 83-2578, slip op. at 3 (E.D. Pa. January 26, 1954), *aff'm,* 746 F.2d 1469 (3d Cir. 1984), the court stated, "In a civil forfeiture proceeding the word 'knowingly' applies to the transportation of money, not to the specific knowledge of the reporting requirements . . . knowledge of the actual transportation of money . . . *per se* invokes the reporting requirements." *Id*, at 3. In that case the claimant admitted he knowingly transported currency in excess of the minimum amount required to involve the reporting requirements. Likewise, Kim has admitted that he and Flack planned to transport approximately $349,700.00 into the United States, an amount well above the minimum of $10,000 required to invoke the reporting requirement. Consequently, defendant currency is subject to forfeiture pursuant to 31 U.S.C. § 5317(c) as currency traceable to the violation of the reporting requirements of § 5316.[10]

Although it is unclear from defendant's memorandum of laws defendant's counsel appears to argue that civil forfeiture under 18 U.S.C. § 981(a)(1)(C) for structuring money to evade filing the currency transaction reports required by 31 U.S.C. § 5324 also requires actual knowledge of the statute. In support of this proposition he quotes, *United States v. Rigdon,* 874 F.2d 774 (11th Cir. 1989), *cert. denied,* 110 S.Ct. 374 (1989), " 'failure to file a CTR is a crime if he had specific knowledge of the statute and to implementing regulations.' " Defendant's Memorandum of Law at 11. While this may be true, it does not address whether the currency is subject to civil forfeiture but rather what standard of intent is required to convict a defendant of a particular crime. Furthermore, claimant has admitted to knowingly and willfully structuring his transactions to evade filing

10. Even if I were to accept Kim's argument that actual knowledge is required, defendant currency would nevertheless be subject to forfeiture because Kim admitted to conspiring to violate the statute thereby admitting actual knowledge of the statute and willful intent to violate it.

CTRs in violation of § 5324. Defendant currency is, therefore, also subject to forfeiture under 18 U.S.C. § 981(a)(1)(C).

CONCLUSION

After considering all the motions, affidavits, and documents of record, I conclude that the only issues presented in this case are purely questions of law, which, when properly resolved, leave no genuine issue of material fact to be considered, and the United States is therefore entitled to summary judgment as a matter of law. Accordingly, the motion of plaintiff United States for summary judgment shall be granted. An appropriate order follows.